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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 862

PENNSYLVANIA WATER & POWER COMPANY,
A CORPORATION,
Petitioner,

vs.

FEDERAL POWER COMMISSION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, AND BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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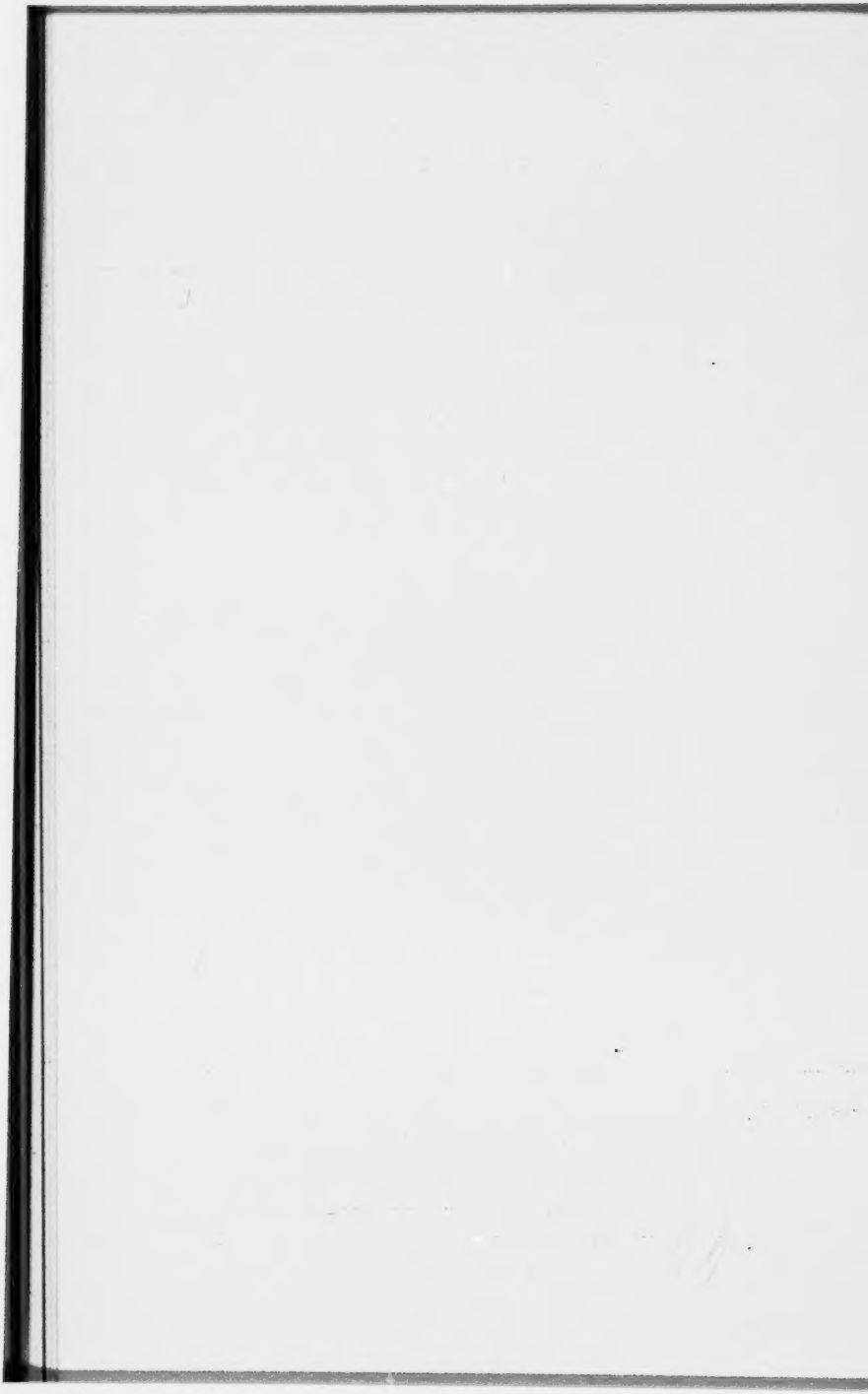

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vs.

FEDERAL POWER COMMISSION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Pennsylvania Water & Power Company, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia in the above cause, entered October 20, 1941 [R. 2322], affirming an order of the respondent, Federal Power Commission (hereinafter called the Commission), dated November 3, 1939 [R. 215], that petitioner shall file an application for a

license under the Federal Power Act to operate and maintain, in the Susquehanna River at Holtwood, Pennsylvania, its dam and power plant—which it has operated and maintained ever since 1910, without question by any branch or agency of the Government until institution of this proceeding by the Commission in 1938.

STATEMENT OF THE MATTER INVOLVED.

The Instant Proceeding.

On September 2, 1938 the Commission issued an order reciting that petitioner "operates and maintains, for the purpose of developing electric power," its dam, reservoir and power house, commonly called the Holtwood development, across and in the Susquehanna River at McCall's Ferry, near Holtwood, Pennsylvania, and that the Susquehanna is a navigable water of the United States from and above the reservoir so operated to its mouth in the Chesapeake Bay. The order directed petitioner to show cause "why appropriate proceedings should not be instituted against" it "for operating and maintaining the said Holtwood development, without a license granted pursuant to the Federal Power Act or a permit or valid existing right-of-way granted prior to June 10, 1920" [*not* "for failure to obtain a license pursuant to the Federal Power Act", as inadvertently stated in the lower Court's opinion]. [R. 27-28, 2308; 123 F. 2d 157]. Petitioner filed an answer admitting the maintenance of the development [*not* "without permit or other authority", as stated in the lower Court's opinion], but denying that the Susquehanna is a navigable water of the United States from above petitioner's reservoir to the Chesapeake Bay or at the site of the Holtwood development, and averring "that in any event there is no occasion for any proceedings against it for operating or maintaining the Holtwood development", and that

the Commission "has no jurisdiction over" it "to institute any such proceedings against it". [R. 28, 3308; 123 Fed. 2d 157]. On November 1, 1938, the Commission issued an order, instituting "an investigation * * * to determine all facts, conditions, or matters relating to the navigability of the Susquehanna River, and the authority under which the Holtwood development is maintained and operated in said river; and whether an order of the Commission appropriate, expedient and in the public interest should be issued to conserve and utilize the navigation and water power resources of said region", and fixing a date for "a public hearing * * * to ascertain all facts pertaining to this investigation and to any other issues raised by the order to show cause and the answer thereto". [R. 29-30].

After the hearing, before an examiner, and the filing of briefs, the Commission on November 3, 1939 issued its opinion (holding that "the Holtwood Project is located * * * in navigable water of the United States" [R. 211]) and its order that petitioner "file with the Commission an application in accordance with the Rules of Practice and Regulations of the Commission for a license under the Federal Power Act to operate and maintain the Holtwood project." [R. 215].

The Commission asserts jurisdiction to make this order under section 4(g) of the Federal Power Act,[1] (inserted

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[1] Sec. 4. The Commission is hereby authorized and empowered—

* * * * * *

(g) Upon its own motion to order an investigation of any occupancy of, or evidenced intention to occupy, for the purpose of developing electric power, public lands, reservations, or streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign na-

by amendment by the Act of 1935) [R. 201]. Petitioner denies the Commission's jurisdiction to make the order —or any order stopping the operation and maintenance of its dam. [R. 19-22].

In its opinion the Commission says:

> "It has been suggested that the Commission may require that the project be removed or entirely reconstructed. There is nothing in the record however which would support a conclusion that such an order would be expedient and in the public interest in this case. We therefore conclude that an appropriate order in this case is an order requiring the respondent to apply for a standard form license under the Act." [R. 207].

There is indeed nothing in the record which would support a conclusion that destruction or reconstruction—or cessation of maintenance and operation—of petitioner's dam would be expedient or in the public interest. On the contrary, the Commission's (unsupported) statement that the *river* is "suitable" for transportation [R. 206] is predicated upon its (unsupported) "finding" that the *Holtwood pool* is "suitable", *i. e.*, upon *utilization* of petitioner's *dam*, and construction of locks in it, as part of the "improvements" in the river necessary to *make* it navigable. [R. 211, 66, 132, 141].

Nor is there anything in the record—or in the Commission's opinion or findings—to indicate that "improve-

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tions and among the several States by any person, corporation, state or municipality and to issue such order as it may find appropriate, expedient, and in the public interest to conserve and utilize the navigation and water-power resources of the region. [Federal Water Power Act, June 10, 1920, c. 285, §4, 41 Stat. 1063; as amended, August 26, 1935, c. 687, Title II, 49 Stat. 838; §797, Title 16. U. S. C. Appendix, *infra*, 42].

ments" *necessary* to make the river navigable would be *"reasonable"*, or *useful*, improvements. The War Department reports over the last fifty years show the contrary [*infra*, 8-10, 15-16]. There is nothing (except these reports) to show what such "improvements" might cost or whether they would be feasible at all. [R. 60-61]. There is nothing, in the reports or elsewhere, to show that such "improvements" (regardless of cost) would be practically useful for commerce. On the contrary, the great number of locks necessary would increase the delays of transportation [*infra*, 10].

Application for rehearing was denied by the Commission. [R. 216-229, 230-231, 2308-2309].

Petitioner filed in the United States Court of Appeals for the District of Columbia, under section 313(b) of the Federal Power Act [U. S. Code, Title 16, §825l; Appendix, *infra*, 44], a petition for review of the Commission's order [R. 1-23]. On such review the Court affirmed the order [R. 2307-2322. *Pennsylvania Water & P. Co. v. Federal Power Com'n*, 123 F. 2d 155].

Petitioner's Dam.

Construction of petitioner's dam at Holtwood (near McCall's Ferry) was begun by McCall Ferry Power Company in 1905 and completed by petitioner in 1910. Petitioner acquired the property in 1910 in a reorganization through foreclosure. Ever since 1910, the dam and power plant have been maintained and operated by petitioner [R. 1-2, 207-208, 127-130]. The dam is about 24.5 miles above the mouth of the Susquehanna, 19.5 miles above tidewater, 9.5 miles above the Maryland line and 18 miles below Columbia [Commission's Exhibit No. 5, not printed; Commission's Exhibit No. 19, R. 447; R. 2308, 123 F. 2d 156-157].

The dam was built under the Pennsylvania Mill Dam Act of 1803,[2] which authorizes owners of lands adjoining any "navigable" stream, "declared by law a public highway"[3] (except the Delaware, Lehigh and Schuylkill), to erect dams, provided they "shall not obstruct or impede the navigation of such stream". In other words, the owner of a dam on the Susquehanna assumes the risk that his dam may obstruct navigation *if* the river is ever made navigable in fact by "improvements". By a decree dated January 14, 1907, in a case of *Pennsylvania v. McCall Ferry Power Co.*, in a state court, the

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[2] 4 Smith's Laws, Ch. 2342; Purdon's Pennsylvania Statutes (1930), Title 55, ch. 10, Secs. 291-293.

[3] By Act of March 31, 1785, (2 Smith's Laws, Ch. 1144) the Susquehanna was declared to be "a public highway" in all parts thereof within the state. In Pennsylvania terminology, a stream that has been declared to be a "public highway"—or to be "navigable"—is *not* necessarily navigable *in fact*. It is navigable *in law, i. e.*, subject to the public easement of navigation *if* and when it is *made* navigable *in fact*. In this sense only, the Susquehanna has been referred to, by the Supreme Court of Pennsylvania, as a "navigable" river. *Carson v. Blazer* (1810) 2 Bin. (Pa.) 475, 477-478. *Commonwealth v. Fisher* (1830), 1 Pen. & W. 462, 467. *Zimmerman v. Union Canal Co.*, (1841), 1 Watts & Serg. 346, 351. *N. Y. & Erie R. Co. v. Young* (1859), 9 Casey 175. *Craig v. Kline* (1870), 65 Pa. 399, 411-412. *Freeland v. Pennsylvania R. Co.* (Pa. 1901), 47 Atl. 745, 746. *Appeal of York Haven Water & Power Co.* (1905) 212 Pa. 622. *Post v. Wilkesbarre Connecting R. R.* (1926), 286 Pa. 273, 277. *York Haven Water & Power Co. v. York Haven P. Co.*, (C. C. A., Third Circuit, 1912), 201 Fed. 270. *Keystone Wood Co. v. Susquehanna Boom Co.*, (C. C. A., Third Circuit, 1917) 240 Fed. 296, 298. In Maryland, as in Pennsylvania, the statutes declaring the Susquehanna a public highway do *not* evidence navigability *in fact*, but the contrary. *Mayor and City Council of Havre de Grace v. Harlow*, 129 Md. 265, 274, 275-278.

right to construct and maintain this dam was held subject to the condition that whenever the navigation of the Susquehanna "shall hereafter be improved either under State or Federal requirement in such way and manner as will secure by the additional construction of a proper lock, or locks, a continuous navigation of said river between Columbia and Havre de Grace", such locks shall be erected by "the defendant corporation and its assigns" at their own expense. [Exhibit No. 65; R. 1463-1464].

The Susquehanna would have been a most important inland waterway *if* in its natural and ordinary condition it had been—or by reasonable improvements it could have been made—navigable for useful commerce of a substantial and permanent character. It was and is, however, navigable only at tidewater (*i. e.*, in Maryland five miles up from its mouth in the Chesapeake Bay) and also in certain unrelated reaches in Pennsylvania and New York (all above Columbia, which is 37.5 miles above tidewater). By reason of its steep slope and large drainage area and the consequent wide variations in amount, depth and velocity of water flow, the lower Susquehanna (between tidewater and Columbia) can not be made navigable for useful commerce—except at prohibitive cost[4] [R. 2314-2316, 123 F. 2d 160-161].

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[4] Common belief that the lower Susquehanna could readily be made navigable was dispelled by experience. Beginning in 1785 individuals, private corporations and public authorities in Pennsylvania and Maryland spent effort and money in the attempt to make the lower Susquehanna navigable. Later, through public and private expenditures, canals were constructed along the banks of the river, paralleling the river from tidewater to the New York State line. The same natural conditions that made the river unnavigable resulted in failure and ruin

For more than 50 years no substantial commercial navigation has existed on the lower Susquehanna or (except in disconnected reaches) on the upper Susquehanna, either in the natural and ordinary condition or any "improved" condition of the river.

Under various Acts of Congress, surveys have been made by Army engineers and full reports transmitted to Congress by the Secretary of War.[5] As the result of these surveys and reports, Congress made twenty appropriations, aggregating $265,390 (between 1852 and 1911), for improvements of the Susquehanna at tidewater; three of $15,000 each (1880, 1881 and 1882) for improvements near Wilkesbarre; and *not one appropriation for improvement of the lower Susquehanna.* [Commission's Exhibit No. 9; R. 234, 236.]

As the lower court says in its opinion,

> "From time to time over the last 50 years surveys of the river with relation to its navigability have been made by the engineer corps of the Army, resulting in reports that the steep slope and rocky bed of the river render impracticable an adequate improvement by open channel means and that to make

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of the canals through repeated floods. The only fruit of the effort to make the river itself navigable was a limited raft and ark traffic down the river during flood seasons. This abnormally dangerous and expensive traffic for a time attained large volume. It was a by-product of the attempt to make the river navigable and the construction of canals; it disappeared with these transitory conditions.

[5] In 1824 President Monroe was requested "to order a general survey" of the Susquehanna and its branches and an estimate of "the probable expense of clearing the river of its obstructions and of a canal from Conewago Falls [above Columbia] to tidewater, if practicable" [Exhibit No. 129; R. 2127].

> the river navigable for commerce would necessitate the expenditure of millions of dollars." [R. 2316, 123 F. 2d 160].

One such report, dated December 20, 1890, under the Rivers and Harbors Act of 1890[6], related particularly to the West Branch [*i. e.*, above Northumberland], but stated that improvement for navigation purposes would be of little value unless continued to Havre de Grace, and concluded that the river was not worthy of improvement.[7] A report under the Rivers and Harbors Act of 1902,[8] received by the House of Representatives on December 18, 1903,[9] concerning an examination of the Susquehanna below Northumberland [*i. e.*, including the whole of the lower Susquehanna], stated that the benefits to be derived from any improvement for navigation purposes "would prove entirely incommensurate with the cost and * * * it is undesirable for the United States to undertake this improvement" [R. 348], that making the Susquehanna navigable for large sized ocean vessels "would be a work comparing in magnitude with the Nicaragua Canal", and "would probably cost nearly half as much as the entire sum appropriated by the Government for river and harbor improvements throughout the country during the entire nineteenth century" [R. 359], that for boats of 6 to 10 feet draft the number of dams would be great and the cost 20 to 30

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[6] September 19, 1890, c. 907, 26 Stat. 454.

[7] House Document No. 136, 51st Congress, 2d Session, Report on examination of the West Branch of the Susquehanna; Exhibit No. 95; R. 1835, 1839-1840.

[8] June 13, 1902, c. 1079, 32 Stat. 330, 376, 382.

[9] House Document No. 219, 58th Congress, 2d Session; Commission's Exhibit No. 18; R. 347.

millions of dollars [R. 349], and that such an increase in the number of locks would increase the delays of transportation and thereby militate against the practicability of using such a waterway for commercial purposes. [R. 361].

CHIEF JUSTICE TANEY'S *Opinion.*

In *The Propeller Genesee Chief v. Fitzhugh,* 12 How. 443, 455, decided at the December Term, 1851, the Court by CHIEF JUSTICE TANEY said (referring to the English definition of admiralty jurisdiction):

> "At the time the Constitution of the United States was adopted, and our courts of admiralty went into operation, the definition which had been adopted in England was equally proper here. In the old thirteen States the far greater part of the navigable waters are tide waters. And *in the states which were at that period in any degree commercial, and where courts of admiralty were called on to exercise their jurisdiction, every public river was tide water to the head of navigation.*" [Italics supplied].

These italicized words were fully applicable to the Susquehanna. For fifteen years CHIEF JUSTICE TANEY, as Circuit Justice, had been presiding over appeals from the only admiralty court that had jurisdiction over the Susquehanna tidewater. His own recollection went back to the time of the adoption of the Constitution.

SECRETARY TAFT'S *Decision.*

Within three months after the report under the Rivers and Harbors Act of 1902 [*supra,* 9-10], the P. B. & W. (now Pennsylvania) Railroad Company submitted plans for a new bridge over the Susquehanna at Havre de Grace (*i. e.,* at tidewater) to the Chief of Engineers and

the Secretary of War for approval under the proviso in Section 9 in the Rivers and Harbors Act of 1899[10]

> "That such structures may be built under authority of the legislature of a State across rivers and other waterways the navigable portions of which lie wholly within the limits of a single State, provided the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of War before construction is commenced:"

This application presented two questions, [1] whether the lower Susquehanna (at, above and below the Pennsylvania line) was a navigable water of the United States and [2] if not, whether the Susquehanna at tidewater in Maryland and the navigable reaches of the *upper* Susquehanna in Pennsylvania were to be regarded as one and the same river within the meaning of the proviso.

On March 8, 1904, SECRETARY TAFT decided both questions (the second *not* material in the instant case) in the negative in the following ruling:

> "Brig. Gen. John Newton,
> Chief of Engineers, U. S. A.
> War Department,
> Washington.
>
> "In the absence of Assistant Secretary Oliver, I have re-examined the questions as to whether the Susquehanna River can be said to be a navigable river within the provisions of the act of Congress requiring that navigable rivers in two States shall not be crossed by bridges, except by authority of Congress, or should be considered as navigable river within one State, consent to cross which may be

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[10] March 3, 1899, c. 425, 30 Stat. 1151, section 9; U. S. Code, Title 33, §401; Appendix, *infra*, 41.

given by the Legislature of the State, with the approval of the Secretary of War.

"My own judgment is that in the present condition of the Susquehanna River it is navigable only within one State. There is no interstate navigation such as was in the mind of Congress in making the distinction. For this reason the consent of the Secretary of War will be regarded as sufficient, and the construction of the bridge allowed in accordance with plans to be approved by this Department. This conclusion is reached on the assumption that the State of Maryland has already consented to the erection of the bridge.

Wm. H. Taft,
Secretary of War.

March 8, 1904."

[Exhibit No. 91; R. 1591].

Concerning this decision, the lower court in its opinion says:

"The decision of Secretary Taft was made in the light of the then established rule that the navigable waters of the United States were confined to those used or susceptible of being used *in their ordinary condition* as highways of commerce by water, and based on that rule the decision was clearly right." [R. 2319, 123 F. 2d 162].

For ten years this decision was consistently followed by the War Department, with the acquiescence of Congress, as a working rule,—a practical administrative construction of the Act of 1899, *as applied to the Susquehanna.* For 34 years (until initiation of the instant proceeding by the Commission on September 2, 1938) SECRETARY TAFT'S decision was accepted by the Government as settling acts done and closed under this practice.

The report of the Chief of Engineers for the year ended June 30, 1904,[11] stated that plans and locations for the Pennsylvania Railroad bridge had been approved under the proviso in section 9 of the Act of 1899. The reports for 1907 and 1908[12] made similar statements concerning a new B. & O. bridge at Havre de Grace. Both the Pennsylvania and B. & O. bridges are still in use; neither was expressly authorized by Act of Congress. [Exhibit No. 98; R. 1875].

Mr. (now Mr. JUSTICE*)* FRANKFURTER'S *Memorandum.*

In 1907 the War Department approved the location and plans for a proposed dam to be built across the Susquehanna at Conowingo, Maryland [*i. e.*, near tidewater]. In February, 1913 application was made for approval of a relocation of the proposed dam. Mr. (now Mr. JUSTICE) FRANKFURTER then submitted to the Secreary of War a memorandum saying that the 1907 approval was based on SECRETARY TAFT'S decision of March 8, 1904. In his memorandum Mr. FRANKFURTER also said:

> "SECRETARY STIMSON directed an inquiry into the present condition of the navigability of the Susquehanna River. The Chief of Engineers reports that the conditions since the ruling of SECRETARY TAFT are unchanged, and that the navigable reach of the river is still wholly within the limits of the State of Maryland. Therefore the application for the re-

[11] House Document No. 2, 58th Congress, 3d Session; Annual Reports of the War Department for the fiscal year ended June 30, 1904, Vol. V, Report of the Chief of Engineers, Part I, pp. 711, 713, 718. *Cf.* Commission's Exhibit No. 9, R. 234, 259.

[12] Report of the Chief of Engineers (1907), pp. 816, 819, 823. *Cf.* Commission's Exhibit No. 9, R. 261. Report of Chief of Engineers (1909), p. 914.

> location of the dam by the Susquehanna Power Company may be authorized by the department if properly supported by the authority of the Legislature of Maryland and if the location and plans for the dam are such as to receive the approval of the Chief of Engineers and the Secretary of War." [Commission's Exhibit No. 11; R. 289].

In June, 1914, in an opinion to the Secretary of War on an application for approval of new plans for the proposed Conowingo dam, the Judge Advocate General expressed the view that SECRETARY TAFT'S decision "in the Pennsylvania Railroad bridge case" was "erroneous in law", and recommended that it be not followed, in view of the fact that *nothing had yet been done or spent on actual construction.* He concluded:

> "I recommend that applicant company be notified that it is the view of the present Secretary of War that the consent of Congress, under existing law, must be obtained for the construction of a dam across the Susquehanna River. The Secretary may be inclined to question the equitableness of such a step at this stage of the proceedings, but it is clear that the present proposition is one *de novo* and should be considered independently of all previous applications. Furthermore, notwithstanding the approval of this company's original plans was given seven years ago, nothing has been done yet on actual construction. This case does not involve the question of the power to rescind a permit after the permittee, in good faith, has made contracts and spent sums of money upon the strength of the permit. It is not a question of rescission at all, but of a new approval. It is not a question of a lawful permit having been given in the first instance, but of an unauthorized approval. So, too, nothing has been spent on actual construction. In my judgment it is better law and better policy to stop the matter here." [Commission's Exhibit No. 11; R. 298-299].

Under the Rivers and Harbors Act of 1919[13], a survey was made of the Susquehanna from Harrisburg to the mouth. The reports, received by the House of Representatives on January 6, 1926, comprise 85 pages of the printed Record.[14] They cover the possibilities of navigation, power development and coordinated development of both. They contain a description of petitioner's dam and power plant ("the largest hydroelectric plant in the State" [R. 393, 2308, 123 F. 2d 157]), proposed additional generating units, and possible inclusion of petitioner's development as "an integral part" of a coordinated navigation and power development; and a statement of petitioner's history and financial condition and the legal status of its dam under SECRETARY TAFT'S decision and the Pennsylvania decree of January 14, 1907 [R. 365, 370, 393-396, 409-410, 419-422].

The reports concluded (among other things) that it would be necessary to canalize the river; that it would be more desirable to do this for a combined navigation and power project than for navigation alone; that the Holtwood development "would become an integral part of the proposed project"; that the estimated cost of the combined project was $114,400,000, including $14,400,000 for locks, channel work and a movable dam, to be charged to navigation, but with the navigation feature eliminated the cost of the power development would be less than the $100,000,000 estimated. The reports recommended "that no navigation improvement be undertaken" and "that the development of the river for power purposes should be left to private interests, with suitable safeguards looking to the possibility of future navi-

[13] March 2, 1919, c. 95, 40 Stat. 1275, 1287-1288.

[14] House Document No. 186, 69th Congress, 1st Session; Commission's Exhibit No. 19; R. 365-447.

gation developments" [R. 364-367]. The reports contained the following statements:

> "The power possibilities of the Susquehanna River are of interest to the Federal Power Commission and" the views expressed by the Board of Engineers in a report dated November 16, 1920 "are based upon a conference with the engineer officer attached to that commission" [R. 381].
>
> "* * * The dam at Holtwood was not built under an act of Congress and a Federal permit, presumably because it was constructed at a time when the Susquehanna River, under a decision of the Secretary of War on March 8, 1904, was considered to be a stream whose navigable portion lay entirely within the State of Maryland. This decision was reversed in 1914 by a succeeding Secretary of War, but by that time the dam had been completed. It therefore appears to be a matter requiring determination in the courts whether the Federal laws for the protection and preservation of navigation could be invoked to require the company to build locks necessary to pass the dam. The company has not applied for a license under section 23 of the Federal water power act. Definite legal power to enforce the construction of locks is, however, conferred by the following decree of the court of common pleas of Dauphin County, Pa.:" (quoting the decree, [*supra*, 6-7]). [R. 419, 421-422].

Statement to Congress by the Commission's Counsel.

The amendments to the Federal Water Power Act of 1920 made by Title II of the Public Utility Act of 1935[15] were requested by the Commission. These amendments were explained to the Committees of Congress by the Commission's Chairman and by Mr. DeVane, one of its

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[15] August 26, 1935, c. 687, 49 Stat. 797.

counsel. In explaining one of the amendments, Mr. DeVane said:

> "Holtwood on the Susquehanna River is a dam that was constructed in 1910 under permit of the War Department."[16]

This is not a technically accurate statement of law, but it is a clear recognition *by the Commission* of the *fact* that petitioner's dam was lawfully constructed under SECRETARY TAFT's decision and maintained *with the consent of Congress and the entire Government.*

JURISDICTION OF THE SUPREME COURT.

This Court has jurisdiction to review the judgment in question under section 313(b) of the Federal Power Act [U. S. Code, Title 16, §8251; Appendix, *infra,* 44] and section 240(a) of the Judicial Code, as amended [U. S. Code, Title 28, §347(a)].

THE QUESTIONS PRESENTED.

I(*a*) Is the Commission—or could it constitutionally be—authorized, by any statute, to order anybody to accept—or apply for—a license?

(*b*) When a dam has been operated ever since 1910, and destruction of the dam or cessation of operation would *not* be expedient or in the public interest, to conserve or utilize navigation or water-power resources,

Is the Commission—or could it constitutionally be—authorized by the Act of 1935, by section 4(g) inserted in the Federal Power Act, to *order* maintenance and operation of the dam stopped *for the sole purpose of exacting ransom for not stopping it?*

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[16] Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, 74th Congress, 1st Session, on H. R. 5423, page 486.

(c) By the Act of 1935, by section 4(g), is the Commission given jurisdiction—and is the jurisdiction of the courts under the Rivers and Harbors Act of 1899 thereby ousted—to determine whether a dam has been unlawfully maintained and operated ever since 1910?

II(a) Does the Act of 1935, by amending section 23 of the Federal Power Act, make unlawful the continued operation and maintenance of a lawfully constructed dam operated ever since 1910?

(b) Congress and the entire Government, before and ever since 1899, having recognized that, *at least for practical purposes,* the Susquehanna is not, and can not by "reasonable improvements" be made, navigable for useful commerce,

Is the Susquehanna a navigable water of the United States *within the meaning of the Rivers and Harbors Act of 1899?*

(c) Petitioner's dam having been constructed (from 1905 till 1910) and operated under the Pennsylvania Mill Dam Act of 1803, with the prior and subsequent *consent* of Congress, *implied* (if not expressed) in the acts and statements of the executive, legislative and judicial departments of the Government for many years before and since it was constructed—including a practical administrative construction of the Rivers and Harbors Act of 1899, *as applied to the Susquehanna,* by SECRETARY TAFT in 1904, followed by the Government for at least ten years and, as to things then done, for 34 years—

Is the dam unlawfully operated and maintained?

(*d*) SECRETARY TAFT'S decision in 1904, followed by Mr. (now Mr. JUSTICE) FRANKFURTER in 1913, being a practical administrative construction of the Act of 1899, *as applied to the Susquehanna River* —which was followed by the Government for at least ten years and, as to things then done, for 34 years, and on the faith of which petitioner's dam, as well as the Pennsylvania and B. & O. railroad bridges, were built—

Did Congress, by the Act of 1935, authorize the Commission to *retroactively overrule* this administrative construction, so as to outlaw a dam built on the faith of this construction and operated without Governmental objection for twenty-five years?

REASONS RELIED ON FOR ALLOWANCE OF CERTIORARI.

The United States Court of Appeals for the District of Columbia has decided novel and substantial questions of general importance, relating to the construction and application of provisions of the Federal Power Act (and the constitutionality of such provisions, *as so construed),* which should be settled by this Court, and has failed to give proper effect to the applicable decisions of this Court.

The lower Court bases its decision principally on the decision of this Court in *United States v. Appalachian Power Co.,* 311 U. S. 377. In so doing it fails to give proper effect to the limitations, expressed [311 U. S. 419, 420-421, 423] or inherent, upon the scope of that decision, and gives undue and improper scope to that decision as overruling previous decisions. In the *Appalachian* case the decision was limited to questions as to "the consti-

tutional power of the United States over its waters" [311 U. S. 426]. The case was instituted under the Act of 1899. Questions as to the *construction* of the Act of 1935—or the Federal Water Power Act of 1920—or the *powers* of the *Commission, under those Acts*—were *not* decided.

(*a*) Neither in the *Appalachian* case nor in any other case has this Court held that the Commission—or any other Governmental agency, or any court—is authorized to *order* anybody to accept—or apply for—a license. In the *Appalachian* case this Court directed entry of [1] an order *enjoining construction,* maintenance or operation "otherwise than under a license", accepted within a reasonable time, "substantially in the form tendered" by the Commission on May 5, 1931, *or,* [2] in the alternative, a mandatory order of *removal* [311 U. S. 429, 401; *cf.* 311 U. S. 424].

(*b*) In the *Appalachian* case the controversy arose *before construction* was begun. The bill was filed within a year after the beginning of construction and a few months before passage of the Act of 1935. The Circuit Court of Appeals held that the Act of 1935, in amending section 23 of the Federal Water Power Act of 1920, is *not* retroactive [107 F. 2d 169, 175]. This Court did *not* disapprove this ruling, or give any retroactive effect to the 1935 amendments of section 23. In the instant case the lower Court construes the prohibitions of section 23 as retroactive [R. 2320-2321; 123 F. 2d 163], citing a passage in this Court's opinion in the *Appalachian* case, which does *not* support such retroactive construction and application [311 U. S., bottom of page 426].

(*c*) The lower Court cites *Greenleaf-Johnson Lumber Co. v. Garrison,* 237 U. S. 251, as "conclusive" that SEC-

RETARY TAFT's decision in 1904, "even if relied on by petitioner in the erection of its dam, affected in no sense the power of Congress to require its abatement * * *" [R. 2320; 123 F. 2d 162-163]. But in that case *demolition* of a wharf was *required* "in the interests of commerce and navigation", *i. e.*, in the *exercise* of the *power to regulate commerce.* It was *not* held that Congress could *order* demolition merely *to exact ransom for not demolishing.* On the contrary, in *United States v. River Rouge Improvement Co.*, 269 U. S. 411, 419 and again in *Wisconsin v. Illinois*, 278 U. S. 367, 415, this Court held that Congress "may not arbitrarily destroy or impair the rights of riparian owners by legislation which has no real or substantial relation to the control of navigation or appropriateness to that end." The lower Court quotes these cases as overruled by the *Appalachian* case [R. 2312; 123 F. 2d 158]. But these cases were *not* overruled; they were *limited only* to the extent of expanding "control of navigation" to "control of navigation *or water-power*" or (at most) to "control of *commerce*". [311 U. S. 424-426]. So limited, these cases still prevent use of the commerce power, however broad, as a *pretext,* to exact ransom for *not* exercising the power by *wantonly destroying property.*

(*d*) The *Applachian* case, and other cases defining the *powers* of Congress, do *not* touch any questions of *construction* of the Act of 1935, *e. g.*, sections 4(g) and 23. Even if the *powers* of Congress are as broad as the lower Court holds they are, the question remains whether [1] Congress has conferred such arbitrary power *on the Commission* or [2] as Mr. JUSTICE HOLMES has said, the United States "prefers to consider itself civilized and to act accordingly". [*Disconto-Gesellschaft v. United States Steel Corp.*, 267 U. S. 22, 28].

(*e*) These novel and substantial questions of *construction* of the Act of 1935, as to the powers and jurisdiction of the Commission (and the kindred questions as to the *powers* of Congress) are of general importance and should be settled (and can only be settled) by this Court.

In *Safe Harbor Water Power Corporation v. Federal Power Commission*, 3 Cir., F. 2d , decided December 2, 1941, the Court set aside an order of the Commission as beyond its jurisdiction. The order purported to fix rates, under section 20 of the Federal Power Act, for power sold in Pennsylvania and Maryland by a Pennsylvania licensee under the Act. The Commission had never before exercised its ratemaking powers under section 20. Section 20 (enacted by the Federal Water Power Act of 1920 and *not* amended by the Act of 1935) confers upon the Commission jurisdiction to regulate interstate rates of licensees "whenever any of the States directly concerned has not provided a commission or other authority to enforce the requirements of this section within such State * * * or such States are unable to agree through their properly constituted authorities * * * on the rates". Pennsylvania and Maryland had provided commissions and were *not* unable to agree on rates. In the Circuit Court of Appeals the Commission suggested somewhat vague and strained reliance on provisions of the Act of 1935, as reflecting on the construction of the unchanged provisions of section 20, enacted in 1920. The Commission has announced to the press, and to the Circuit Court of Appeals, its intention to apply for the writ of certiorari in that case.

Refusal in the *Safe Harbor* case to stretch the plain words of the hitherto unused provisions of section 20 does not present questions of any such general or far-reaching importance as those presented in the instant

case. By the lower Court's construction apparently innocent generalities, in "minor" amendments requested and obtained by the Commission in the Act of 1935, confer sweeping *retroactive* powers to destroy, or hold to ransom, property rights exercised for 28 years without question by any branch or instrumentality of the Government and in reliance on the administrative action of the Commission's own predecessors, including SECRETARY TAFT and Mr. FRANKFURTER.

Wherefore your petitioner submits that this petition for the writ of certiorari should be granted as prayed.

WALTER C. CLEPHANE,
CHARLES MARKELL,
GEORGE T. HAMBRIGHT,
ARTHUR H. CLEPHANE,
Counsel for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. .....

PENNSYLVANIA WATER & POWER COMPANY,
A CORPORATION,
Petitioner,

vs.

FEDERAL POWER COMMISSION,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINION BELOW.

The opinion of the lower Court [R. 2307-2322] is reported as *Pennsylvania Water & P. Co. v. Federal Power Com'n,* 123 F. 2d 155.

JURISDICTION—STATEMENT OF THE CASE.

The petition for certiorari contains a statement of the grounds on which the jurisdiction of this Court is invoked [*supra,* 17] and a statement of the case [*supra,* 2-17].

SPECIFICATION OF ERRORS TO BE URGED.

The United States Court of Appeals erred:

1. In affirming, and not setting aside, the Commission's order.

2. In holding that the Commission (*a*) constitutionally (*i. e.*, consistently with the due process clause of the Fifth Amendment) can be, and (*b*) by section 4(g) of the Federal Power Act is, authorized to *order* petitioner to apply for a license.

3. In holding that by section 4(g) the Commission is given jurisdiction to determine that petitioner's dam has been unlawfully maintained and operated ever since 1910.

4. In construing section 23, as amended by the Act of 1935, as retroactive, making unlawful the continued operation and maintenance of a lawfully constructed dam operated ever since 1910.

5. In holding that the Susquehanna, at Holtwood, Pennsylvania, is a navigable water of the United States *within the meaning of the Act of 1899.*

6. In holding that petitioner's dam is unlawfully operated and maintained.

7. In holding that by the Act of 1935 Congress authorized the Commission to *retroactively overrule* SECRETARY TAFT'S and Mr. FRANKFURTER'S practical administrative construction of the Act of 1899, *as applied to the Susquehanna,* so as to outlaw a dam built on the faith of that construction and operated without Governmental objection for 25 years.

ARGUMENT.

I

A

THE COMMISSION IS NOT—AND COULD NOT CONSTITUTIONALLY BE—AUTHORIZED, BY ANY STATUTE, TO *ORDER* ANYBODY TO ACCEPT—OR APPLY FOR—A LICENSE.

In the United States nobody can be *ordered* by an administrative body to accept a license or to make any other contract, on terms to be fixed by the body making the order. This is beyond the broadest administrative power; the most restricted "freedom of contract" includes "freedom * * * to refuse to make an agreement"—though *not* to refuse to put an agreement in writing [*H. J. Heinz Co. v. National Labor Relations Board*, 311 U. S. 514, 525-526]. In the *Appalachian* case this Court authorized no such order [311 U. S. 429, 401, 424; *supra*, 20].

No such power—nor power to order anybody to *apply for* a license, on terms not even stated in the order—is granted to the Commission by the general language of section 4(g). Section 4(g) should not be expanded by construction. Under the Federal Water Power Act of 1920 the Commission had no power to require anybody to become a licensee. In the Act of 1935 the amendments [including section 4(g)] to the Act of 1920 were requested by the Commission. These amendments were presented by the Commission to the House and Senate Committees, and were reported by the Committees, as "all minor"; the Commission's counsel testified that they make "no amendments to the licensing sections of the Water Power Act".[17]

[17] Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, 74th Congress, 1st Session, on H. R. 5423, pages 384, 388, 450. House Report No. 1318, 74th Congress, 1st Session, pages 7-8. Senate Report No. 621, 74th Congress, 1st Session, pages 17-18.

Properly speaking, a "shot-gun marriage" is not a contract. Nor can anybody be *ordered* to *apply for* a marriage license—or a license under the Federal Power Act.

B

THE COMMISSION IS NOT—AND COULD NOT CONSTITUTIONALLY BE—AUTHORIZED BY THE ACT OF 1935, BY SECTION 4(g), TO *ORDER* MAINTENANCE AND OPERATION OF A DAM STOPPED, FOR THE SOLE PURPOSE OF EXACTING RANSOM FOR *NOT* STOPPING IT.

The lower Court bases its affirmance of the Commission's order on (*a*) the "continuing" "paramount authority" of the United States to "abate obstructions" "in the interests of commerce and navigation" [R. 2318-2321; 123 F. 2d 162-163] and (*b*) the *Appalachian* case, as overruling *United States v. River Rouge Improvement Co.*, 269 U. S. 411, 419 and *Wisconsin v. Illinois*, 278 U. S. 367, 415 [*supra*, 20-21]. But the Commission (if it possessed such power) did *not* exercise the sovereign power to "abate obstructions". On the contrary, it found that removal of petitioner's dam would *not* be "expedient and in the public interest" [*supra*, 4]. Nevertheless it ordered petitioner to apply for a license—containing an option to the Government to acquire the dam for less than its fair value [*Appalachian* case, 311 U. S. 377, 427-428]—as a *price* for *not* exercising power to "abate" it.

This reasoning and conclusion of the lower Court is contrary to the decisions of this Court. However broad may be the power to "abate obstructions in the interests of commerce", a *threat* to exercise such power (when *not* in the public interest) can not be used to exact money or property for *not* arbitrarily *abusing* the power. Congress "may not arbitrarily destroy or impair the rights of riparian owners by legislation which has no real or substantial relation to the control of navigation [or

water-power (?)] or appropriateness to that end". [*United States v. River Rouge Improvement Co.*, 269 U. S. 411, 419; *Wisconsin v. Illinois*, 278 U. S. 367, 415]. The broader the power may be, the clearer this limitation is. The "paramount authority of the United States", to "abate obstructions" constructed with its express consent [*Louisville Bridge Co. v. United States*, 242 U. S. 409, 417], must extend to "obstructions" constructed under a Federal Power Commission license, no less than to obstructions expressly authorized by Act of Congress. But the United States could not, by *threatening* to "abate" a licensed dam, exact *new* or *additional* license terms or make other pecuniary or proprietary exactions, for *not* "abating" the dam. The *Appalachian* case does *not* support any such perversion of sovereign power or overrule the cases that deny such arbitrary power.

At all events, section 4(g) of the Federal Power Act does *not* delegate to the Commission either (*a*) the sovereign power of the United States to revoke its previous consent to construction of "obstructions" or (*b*) arbitrary authority to pervert such power by exacting ransom for *not* exercising it, when it is *not* in the public interest to exercise it. At most, section 4(g) is limited to orders "appropriate, expedient and in the public interest to conserve and utilize the navigation and water-power resources of the region". There is no evidence whatever—and no finding—[1] that *for practical purposes* there are at present any navigation resources or [2] that the water-power resources are *not* utilized to the utmost by petitioner [*supra*, 4, 15, 16; R. 207, 137].

The inalienable power of the United States to "abate obstructions"—*a fortiori*, the delegated power (if any)

of the Commission under section 4(g)—is in this respect no broader than the similar police power of the states over streets [*cf., Appalachian* case, 311 U. S. 377, 427]. Such power can *not* be used to exact payment for *not* exercising the power. [*Minor Privilege Cases*, 131 Md. 600, 609-610, 621-622].

C

BY THE ACT OF 1935, BY SECTION 4(g), THE COMMISSION IS *NOT* GIVEN JURISDICTION—AND THE JURISDICTION OF THE COURTS UNDER THE ACT OF 1899 IS *NOT* THEREBY OUSTED—TO DETERMINE WHETHER A DAM HAS BEEN UNLAWFULLY MAINTAINED AND OPERATED EVER SINCE 1910.

By section 4(g) the Commission is empowered "to order an investigation of any occupancy of, or evidenced intention to occupy", water for the purpose of developing electric power and "to issue such order as it may find appropriate, expedient and in the public interest to conserve and utilize the navigation and water-power resources of the region". Under this general language the Commission asserts—and the lower Court affirms—broad new *retroactive* powers, *e. g.*, to decide [1] that SECRETARY TAFT'S decision in 1904 was erroneous, [2] that from 1905 to 1910 petitioner's dam was constructed contrary to law and [3] that from 1905 to 1935 Congress never gave its consent, express or implied, to the construction and operation of the dam. Thus construed, section 4(g) supplants the existing jurisdiction of the Courts and broadens the Commission's limited powers (to do and require things specified in detail in Parts I, II and III of the Federal Power Act) into unlimited power to do and require *anything* relating to *occupancy* of water for power purposes.

Such a grant of power to an administrative body (if constitutional) is apparently unprecedented.[18] The distinction drawn by Mr. JUSTICE HOLMES between judicial action (which is based on "present or past facts" and existing laws) and legislative—or administrative—action (which "looks to the future" and makes "a new rule to be applied thereafter")[19] is generally, if not universally, observed. Questions of title to land, between a riparian owner and the Government, *arising 28 years after completion of a dam*, are essentially judicial questions, suitable for judicial decision by the courts—*not* for *retroactive* reversal by an administrative commission of a decision made 35 years before by its administrative predecessor *then* charged with the application and enforcement of the statutes in question.[20]

Properly construed, section 4(g), like section 4(a),[21] confers no such new substantive powers, but only authority to order investigations—and instigate judicial proceedings—in aid of the exercise of its substantive powers. In the *Appalachian* case the Circuit Court of Appeals distinguished between an "investigation" under section 4(a) and a "hearing". [*United States v. Appalachian Electric Co.*, 4 Cir., 107 F. 2d 769, 792].

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[18] See *Crowell v. Benson*, 285 U. S. 22, 58-61, and cases there cited, including *Ng Fung Ho v. White*, 259 U. S. 276, 282-285; *United States v. Appalachian Electric Power Co.*, 4 Cir., 107 F. 2d 769, 791.

[19] *Prentis v. Atlantic Coast Line*, 211 U. S. 210, 226.

[20] *Helvering v. Reynolds*, 306 U. S. 110, 116, 117. *Cf. Arizona Grocery v. Atchison Ry.*, 284 U. S. 370, 389.

[21] Appendix, *infra*, 42.

II.

A.

THE ACT OF 1935, BY AMENDING SECTION 23 OF THE FEDERAL POWER ACT, DOES *NOT* MAKE UNLAWFUL THE CONTINUED OPERATION AND MAINTENANCE OF A LAWFULLY CONSTRUCTED DAM OPERATED EVER SINCE 1910.

In construing section 23 as retroactive [R. 2320-2321; 123 F. 2d 163], the lower Court misconstrues both the words and the purpose of the Act of 1935. That Act is *not* an "exercise by the United States of its paramount authority" [R. 2321; 123 F. 2d 163] to revoke its consent to an "obstruction" and "to abate the obstruction" [R. 2319; 123 F. 2d 162] in the interests of some particular river "improvement". It is merely a general law, containing new *prospective* prohibitions, similar to but slightly different from the successive prohibitions in the Rivers and Harbors Acts of 1890 and 1899.[22]

Under section 23(b),[23] "It shall be unlawful * * * to construct, operate or maintain" a dam except under "a permit or a valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to this Act". The natural *prospective* construction of this prohibition is that it is applicable only to *construction* of dams *after the passage of the Act of 1935* and to *operation* or *maintenance* of dams *so constructed.*

Laws are not to be held retroactive unless that intention be clearly declared. [*Shwab v. Doyle*, 258 U. S. 528, 534-535 and cases cited].

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[22] See House Report No. 1318, 74th Congress, 1st Session, p. 25; Senate Report No. 621, 74th Congress, 1st Session, p. 47.

[23] Appendix, *infra*, 43.

Furthermore, section 23(a) is a saving clause to the same effect, viz., that the provisions of Part I of the Federal Power Act "shall not be construed as affecting any permit or valid existing right-of-way heretofore granted * * * or as affecting any authority heretofore given pursuant to law".[24] "Any authority given pursuant to law" is all-comprehensive, embracing alike any consent of Congress, express or implied, or authority under state law when Congressional consent was not required.[25]

B.

THE SUSQUEHANNA IS *NOT* A NAVIGABLE WATER OF THE UNITED STATES *WITHIN THE MEANING OF THE RIVERS AND HARBORS ACT OF 1899.*

The Act of 1899 was not an abstract essay on constitutional law. Nor was it a trap for those who might guess a *future* decision of this Court wrong, by relying on a *present* decision of the Secretary of War in charge of administration of the Act. The Act was a *practical* regulation of the construction and maintenance of "obstructions" in waters.

The *words* of the Act, "navigable water of the United States", are broad enough to embrace any water within the constitutional power of Congress. [*Economy Light*

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[24] Appendix, *infra*, 43.

[25] The Rivers and Harbors Act of 1890 (September 19, 1890, c. 907, 26 Stat. 454, Sec. 10) prohibited "the creation of any obstruction, not affirmatively authorized by law" to navigable capacity or "the continuance of any such obstruction" (with specified exceptions); this provision did *not* prohibit continuance of an obstruction authorized by state law. *United States v. Bellingham Bay Boom Co.*, 176 U. S. 211, 214-215; *Sanitary District v. United States*, 266 U. S. 405, 429; *Wisconsin v. Illinois*, 278 U. S. 367, 342.

Co. v. United States, 256 U. S. 113, 123-124]. But the *application* of these words to particular waters involves "questions of law inseparable from the particular facts to which they are applied"; each application of the legal test "is apt to uncover variations and refinements which require further elaboration" [*Appalachian* case, 311 U. S. 377, 404, 406]. Congress is at liberty to cut this Gordian knot by indicating that, as applied to any particular waters, the *words* of the Act shall be given *less* than their maximum possible scope. In the case of the Desplaines River Congress did *not* intend to limit the scope of the words. By the Act of 1899 itself $200,000 was specifically appropriated for the survey of the Desplaines; in 1910 $1,000,000 was appropriated for its improvement. [*Illinois v. Economy Power Co.*, 234 U. S. 497, 502, argument of counsel].

On the other hand, in more than 30 instances, from 1900 to 1937, Congress has by special acts declared a particular river or portion of a river to be *not* a navigable water of the United States *within the meaning of the Act of 1899.*[26] There is no reason why such Congres-

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[26] Cuivre River, in the counties of Lincoln and Saint Charles, Missouri, 1900 [33 U. S. C. A. §29].
Mississippi River, West Channel, opposite LaCrosse, Wisconsin, 1901 [33 U. S. C. A. §35].
Osage River, Missouri, in 1902 and 1904 [33 U. S. C. A. §41].
Grand River, Missouri, above Brunswick, 1905 [33 U. S. C. A. §30].
Sturgeon Bay, Illinois, 1907 [33 U. S. C. A. §44].
Big Tarkio River, Missouri, 1910 [33 U. S. C. A. §24].
Nodaway River, Missouri, 1910 [33 U. S. C. A. §37].
One Hundred and Two River, Missouri, 1910 [33 U. S. C. A. §40].
Mill Slough, Oregon, 1913 [33 U. S. C. A. §34].
Swan Creek, Toledo, Ohio, 1915 [33 U. S. C. A. §45].
Cache River, Arkansas, 1916 [33 U. S. C. A. §25].

sional intent can not be manifested *informally* in any of the usual ways, *e. g.*, by acquiescence in administrative construction and application of the Act by the Secretary of War, and by acceptance of the reports of surveys made by direction of Congress and action (and non-action) in accordance with these reports. Congressional recognition of such reports is given in section 3(8)[27] of the Federal Water Power Act of 1920, defining "navigable waters" as including such

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Bayou Meto, Arkansas, 1917 [33 U. S. C. A. §22].
Mosquito Creek, South Carolina, 1917 [33 U. S. C. A. §36].
Ollala Slough, Oregon, 1917 [33 U. S. C. A. §39].
Saint Marys River, Ohio and Indiana, 1917 [33 U. S. C. A. §43].
Little River, Arkansas, from Big Lake to Marked Tree, 1919 [33 U. S. C. A. §33].
Bayou Cocodrie, Louisiana, 1921 [33 U. S. C. A. §21].
Platte River, Missouri, 1921 [33 U. S. C. A. §42].
Lake George, Mississippi, 1922 [33 U. S. C. A. §32].
Tchula Lake, Mississippi, 1922 [33 U. S. C. A. §46].
Bear Creek, Mississippi, 1923 [33 U. S. C. A. §23].
Eagle Lake, Louisiana-Mississippi, 1926 [33 U. S. C. A. §47].
Noxubee River, Mississippi, 1934 [33 U. S. C. A. §48].
East River, Wisconsin, 1935 [33 U. S. C. A. §29a].
Bayou Saint John, in New Orleans, 1936 [33 U. S. C. A. §49].
Turtle Bay and Turtle Bayou, Texas, 1937 [33 U. S. C. A. §50].
Scajaquada Creek, New York, 1937 [33 U. S. C. A. §51].
Park River, Connecticut, 1937 [33 U. S. C. A. §52].
Benton Harbor Canal, Michigan, 1937 [33 U. S. C. A. §53].
Burr Creek, Bridgeport, Connecticut, 1937 [33 U. S. C. A. §54].
Bayou Savage (or Chantilly), in New Orleans, 1937 [33 U. S. C. A. §55].
Other waters [33 U. S. C. A. §§26, 26a, 26b, 27, 27a, 38].

[27] Appendix, *infra*, 41.

parts of streams as "shall have been authorized by Congress for improvement by the United States or shall have been recommended to Congress for such improvement after investigation under its authority".[28] True, this definition is inclusive, not exclusive; nevertheless it attests the *Congressional status of War Department recommendations to Congress after investigation under its authority.*

Congress and the entire Government, before and ever since 1899, have recognized that, *at least for practical purposes,* the Susquehanna is not, and cannot by "reasonable" improvements be made, navigable for useful commerce. As the lower Court holds, SECRETARY TAFT's decision, when made, "was clearly right". [R. 2319; 123 F. 2d 162; *supra,* 12]. It is likewise clear that Congress did *not* intend to prohibit—or outlaw—petitioner's dam. The Congressional intent is clear, whether the action manifesting the intent amounts to an estoppel or not.[29]

C.

PETITIONER'S DAM IS *NOT* UNLAWFULLY OPERATED AND MAINTAINED.

Whether Congress be regarded as "construing" the Act of 1899, *as applicable to the Susquehanna,* or as *consenting* to the maintenance of petitioner's dam, the result is the same. In either aspect, the dam is *not* unlawfully maintained.

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[28] Appendix, *infra,* 41, 42.

[29] *Monongahela Navigation Co. v. United States,* 148 U. S. 312, 313, 334-335; *Lewis Blue Point Oyster Co. v. Briggs,* 229 U. S. 82, 89; *Greenleaf Lumber Company v. Garrison,* 237 U. S. 251, 266. *Cf. United States v. Southern Power Co.,* 4 Cir., 31 F. 2d 852.

The "consent of Congress", required by the Constitution with respect to an agreement or compact between states, may be either express or *implied*, prior or subsequent.[30] No more formality is necessary with respect to the self-imposed requirement of the "consent of Congress" under the Act of 1899. In the instant case the consent of Congress is *implied* (if not expressed) in the acts and statements of the executive, legislative and judicial departments of the Government for many years before and since the dam was built, including SECRETARY TAFT's practical administrative construction, followed by the Government for at least ten years and, as to things then done, for 34 years [*supra,*].

The lower Court holds that this consent of Congress was ineffective because the plans for petitioner's dam were not approved by the Secretary of War and the Chief of Engineers under section 9 of the Rivers and Harbors Act of 1899 [R. 2318; 123 F. 2d 162]. But the reports of the survey made under the Rivers and Harbors Act of 1919 amount to full approval of the completed dam itself [*supra,* 15-16]. Indeed, the consent of Congress *after* completion of the dam necessarily carries with it approval of the plans and locations. Furthermore, this consent of Congress, like the special acts relating to particular waters, manifested an intent to exclude the lower Susquehanna from *all* the requirements of the Act of 1899 concerning navigable waters [*supra,* 34-36].

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[30] *Virginia v. Tennessee,* 148 U. S. 503, 521-523. *Cf. Safe Harbor Water Power Corporation v. Federal Power Commission,* 3 Cir., —— F. 2d ——, decided December 2, 1941; "The Compact Clause of the Constitution," Messrs. Frankfurter and Landis, selected Essays on Constitutional Law, Vol. 3, p. 1606; Yale Law Journal, Vol. XXXIV, p. 685.

D.

CONGRESS DID *NOT*, BY THE ACT OF 1935, AUTHORIZE THE COMMISSION TO *RETROACTIVELY OVERRULE* SECRETARY TAFT'S AND MR. FRANKFURTER'S ADMINISTRATIVE CONSTRUCTION OF THE ACT OF 1899, *AS APPLIED TO THE SUSQUEHANNA RIVER*, SO AS TO OUTLAW A DAM BUILT ON THE FAITH OF THAT CONSTRUCTION AND MAINTAINED WITHOUT GOVERNMENTAL OBJECTION FOR 25 YEARS.

On December 18, 1903 the exhaustive report to Congress of the survey directed by the Rivers and Harbors Act of 1902 demonstrated that use of an "improved" waterway in the Susquehanna for commercial purposes was impracticable and such an "improvement" was undesirable [*supra*, 9-10]. On March 8, 1904 SECRETARY TAFT made his decision in the case of the Pennsylvania railroad bridge at Havre de Grace [*supra*, 10-12]. From 1905 to 1910 petitioner's dam was built—and also both the Pennsylvania and B. & O. bridges at Havre de Grace. In 1913, SECRETARY TAFT's decision was followed by MR. FRANKFURTER [*supra*, 5, 10-14].

In 1914 the Judge Advocate General expressed the view that SECRETARY TAFT's decision was "erroneous in law" (principally on the point *not* involved in the instant case, viz., the effect of navigability of isolated reaches in two states). He recommended that SECRETARY TAFT's decision be not *further* followed in new matters—but *not* that it be overruled retroactively [*supra*, 14].

In 1926 the voluminous reports to Congress of the survey directed by the Rivers and Harbors Act of 1919 contained a full statement of the legal status of petitioner's dam under SECRETARY TAFT's decision and the Pennsylvania decree of January 14, 1907, and expressed the opinion [1] that it was a question for the courts "whether the Federal laws for the protection and preservation

of navigation could be invoked to require the company to build locks necessary to pass the dam", but [2] that "definite legal power to enforce the construction of locks" was conferred by the Pennsylvania decree [*supra*, 15-16]. This opinion necessarily excluded any possibility that *under existing laws* the Commission or the Government could destroy the dam—or exact ransom for *not* destroying it.

In 1935, at the Commission's request, Congress enacted amendments, "all minor", to the Federal Water Power Act of 1920. The Commission now contends—and the lower Court holds—that two of these "minor" amendments [sections 4(g) and 23(b)] empower the Commission to destroy the dam or to exact ransom for *not* doing so.

The result does violence, not only to the fair meaning of the words of the Act of 1935, but also to established doctrine as to administrative construction of statutes and judicial construction of the powers of administrative bodies. By statute administrative authorities are given broad powers, which they may exercise *for the future*, often with little regard for the past so far as precedents are concerned. By the same token they can *not*, by retroactive action, reach back into the past and devour the fruits of their own or their predecessors' past action.[31] In this aspect, the question is not one of constitutional power, but of construction, viz., whether the United States "prefers to consider itself civilized and to act accordingly". [*Disconto-Gesellschaft v. United States Steel Corp.*, 267 U. S. 22, 28].

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[31] *Helvering v. Reynolds Tobacco Co.*, 306 U. S. 110, 116, 117, *Cf. Arizona Groc. Co. v. Atchison, Topeka & Sante Fe Ry. Co.*, 284 U. S. 370, 389.

The decision below is also fundamentally opposed to the *Appalachian* case, on which it purports to rest. *If* the general language of section 4(g) gives the Commission universal power to destroy—or hold to ransom—any "obstruction", licensed or unlicensed, lawfully or unlawfully constructed, *then* licenses are unnecessary and futile. *If* existing law recognizes no distinction between *constructing* a dam without a license and *continuing* to *maintain* and *operate* one constructed with the consent of Congress, express or implied, prior or subsequent, *then* a license has no practical relation to "national planning", and "to deny the privilege of constructing an obstruction" or to "grant the privilege on terms" [311 U. S. 426, 427] is a useless preliminary to destroying the obstruction after it is completed—or holding it to ransom.

For the reasons stated the writ of certiorari should be granted.

Respectfully submitted,

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ARTHUR H. CLEPHANE,
Counsel for Petitioner.

APPENDIX.

RIVERS AND HARBORS ACT OF 1899, SECTION 9.

[33 U. S. C. A. §401, Mar. 3, 1899, c. 425, §9, 30 Stat. 1151.]

Section 401. Construction of bridges, causeways, dams or dikes generally. It shall not be lawful to construct or commence the construction of any bridge, dam, dike, or causeway over or in any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of War: *Provided,* That such structures may be built under authority of the legislature of a State across rivers and other waterways the navigable portions of which lie wholly within the limits of a single State, provided the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of War before construction is commenced: *And provided further,* That when plans for any bridge or other structure have been approved by the Chief of Engineers and by the Secretary of War, it shall not be lawful to deviate from such plans either before or after completion of the structure unless the modification of said plans has previously been submitted to and received the approval of the Chief of Engineers and of the Secretary of War.

FEDERAL POWER ACT (OF 1935), SECTION 3(8), (FEDERAL WATER POWER ACT, AS AMENDED BY ACT OF 1935).

[16 U. S. C. A. §796, as amended Aug. 26, 1935, c. 687, Title II, §201, 49 Stat. 838. Paragraph (8) unchanged.]

SEC. 3. The words defined in this section shall have the following meaning for purposes of this chapter, to wit:

(1) * * *

(8) "navigable waters" means those parts of streams or other bodies of water over which Congress has juris-

diction under its authority to regulate commerce with foreign nations and among the several States, and which either in their natural or improved condition notwithstanding interruptions between the navigable parts of such streams or waters by falls, shallows, or rapids compelling land carriage, are used or suitable for use for the transportation of persons or property in interstate or foreign commerce, including therein all such interrupting falls, shallows, or rapids, together with such other parts of streams as shall have been authorized by Congress for improvement by the United States or shall have been recommended to Congress for such improvement after investigation under its authority;

(9) * * *

FEDERAL POWER ACT (OF 1935), SECTION 4, (FEDERAL WATER POWER ACT, AS AMENDED BY ACT OF 1935).

[16 U. S. C. A. §797, as amended Aug. 26, 1935, c. 687, Title II, §202, 49 Stat. 839].

SEC 4. The Commission is hereby authorized and empowered—

(a) To make investigations and to collect and record data concerning the utilization of the water resources of any region to be developed, the water-power industry and its relation to other industries and to interstate or foreign commerce, and concerning the location, capacity, development costs, and relation to markets of power sites, and whether the power from Government dams can be advantageously used by the United States for its public purposes, and what is a fair value of such power, to the extent the Commission may deem necessary or useful for the purposes of this Act.

* * *

(g) Upon its own motion to order an investigation of any occupancy of, or evidenced intention to occupy, for the purpose of developing electric power, public lands, reservations, or streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the

several States by any person, corporation, state or municipality and to issue such order as it may find appropriate, expedient, and in the public interest to conserve and utilize the navigation and water-power resources of the region.

FEDERAL POWER ACT (OF 1935), SECTION 23 (FEDERAL WATER POWER ACT, AS AMENDED BY ACT OF 1935).

[16 U. S. C. A. §§816, 817, as amended August 26, 1935, c. 687, Title II, §210, 49 Stat. 846].

SEC. 23. (a) The provisions of this Part shall not be construed as affecting any permit or valid existing right-of-way granted prior to June 10, 1920, or as confirming or otherwise affecting any claim, or as affecting any authority heretofore given pursuant to law, but any person, association, corporation, State, or municipality holding or possessing such permit, right-of-way, or authority may apply for a license hereunder, and upon such application, the Commission may issue to any such applicant a license in accordance with the provisions of this Part and in such case the provisions of this chapter shall apply to such applicant as a licensee hereunder: *Provided*, That when application is made for a license under this section for a project or projects already constructed the fair value of said project or projects determined as provided in this section, shall for the purposes of this Part and of said license be deemed to be the amount to be allowed as the net investment of the applicant in such project or projects as of the date of such license, or as of the date of such determination, if license has not been issued. Such fair value shall be determined by the Commission after notice and opportunity for hearing.

(b) It shall be unlawful for any person, State, or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the navigable waters of the United States, or upon any part of the public lands or reservations of the United States (including

the Territories), or utilize the surplus water or water power from any Government dam, except under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to this chapter. Any person, association, corporation, State, or municipality intending to construct a dam or other project works across, along, over, or in any stream or part thereof, other than those defined herein as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States shall before such construction file declaration of such intention with the Commission, whereupon the Commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction, such person, association, corporation, State, or municipality shall not construct, maintain, or operate such dam or other project works until it shall have applied for and shall have received a license under the provisions of this chapter. If the Commission shall not so find, and if no public lands or reservations are affected, permission is hereby granted to construct such dam or other project works in such stream upon compliance with State laws.

FEDERAL POWER ACT (OF 1935); SECTION 313(b) (ADDED BY ACT OF 1935).

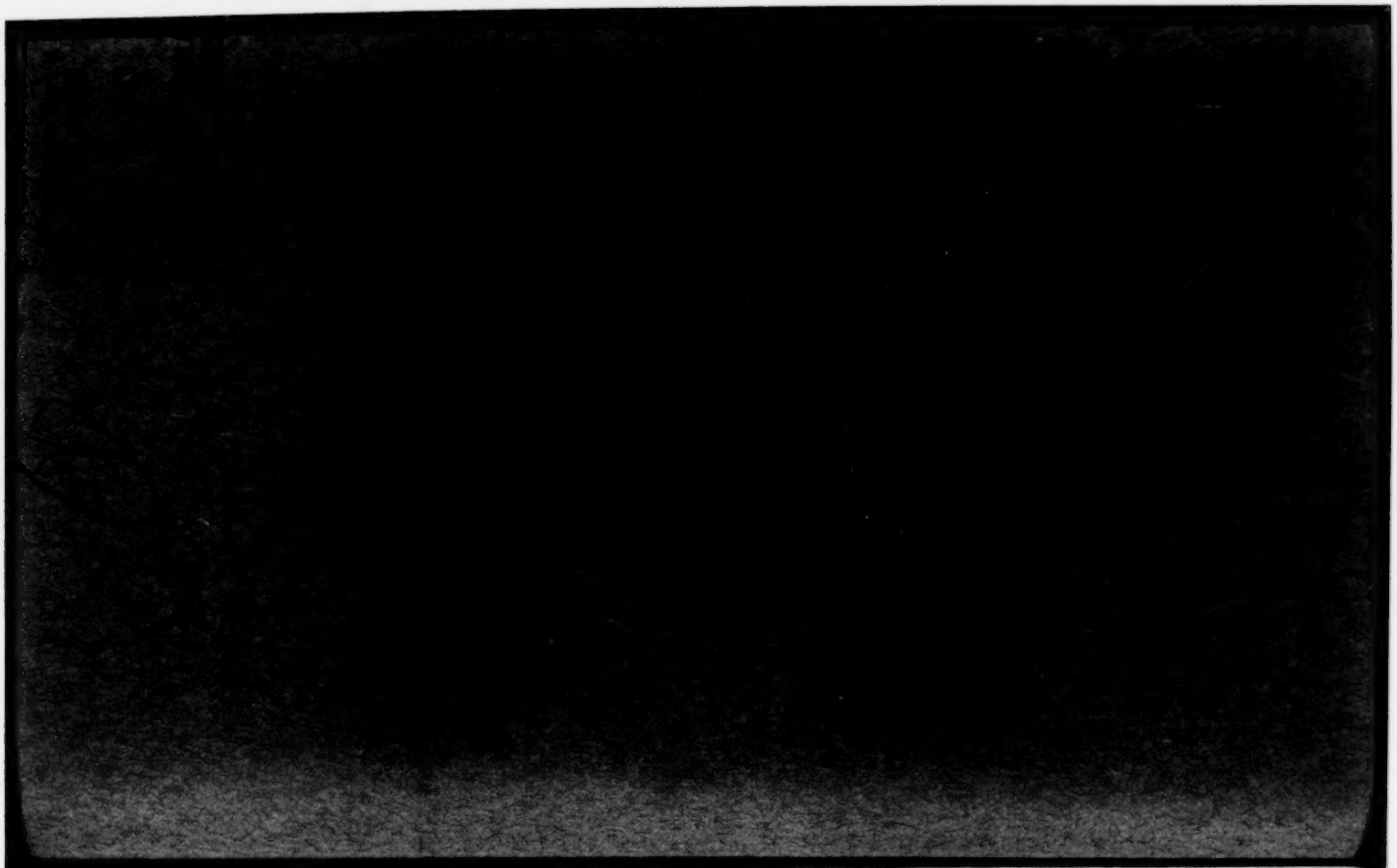
[16 U. S. C. A. §825l, as added Aug. 26, 1935, c. 687, Title II, §213, 49 Stat. 860.]

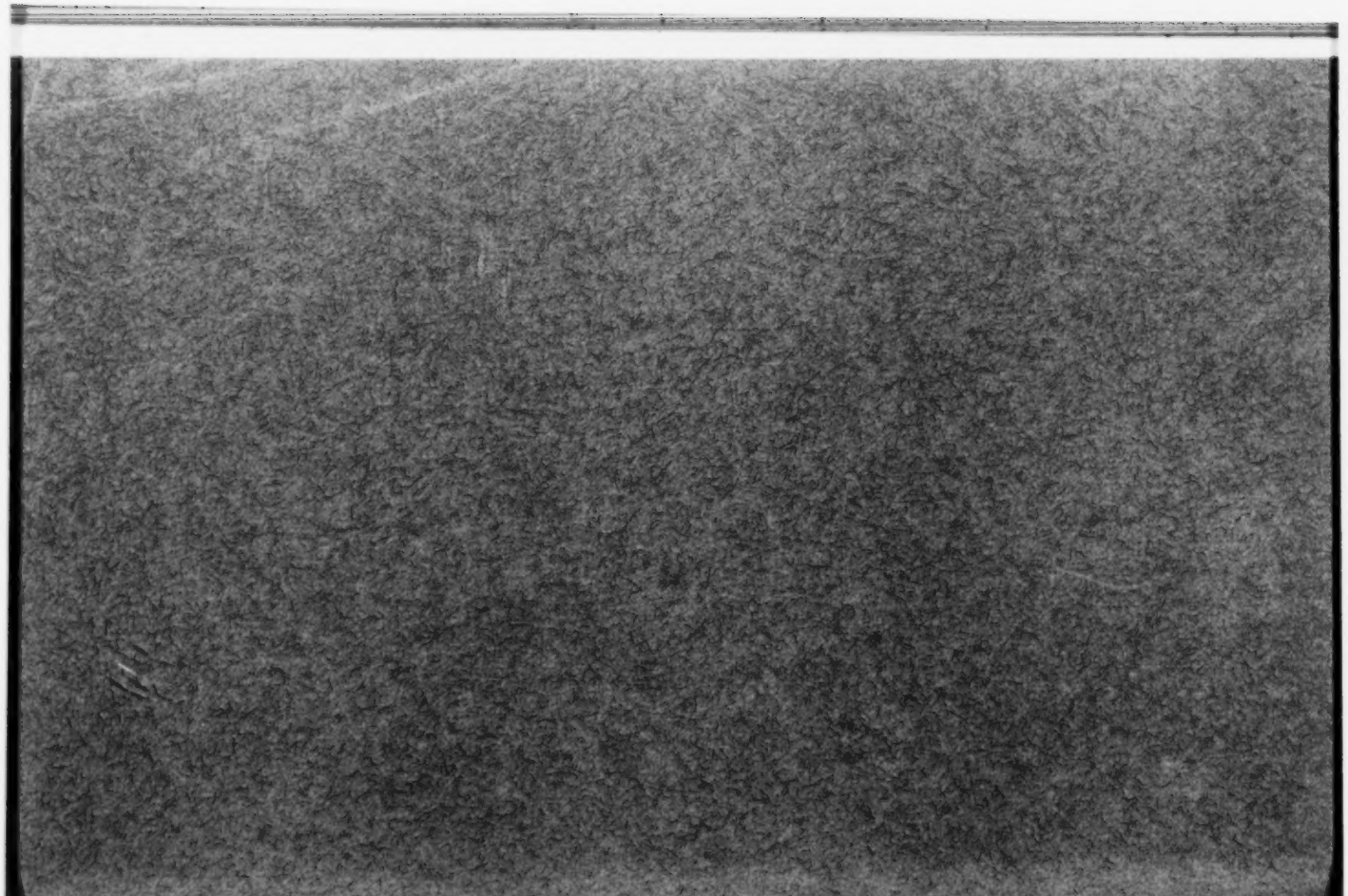
SEC. 313. (a) * * *

(b) Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the Circuit Court of Appeals of the United States for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of

business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 346 and 347 of Title 28.

(c) * * *





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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 862

PENNSYLVANIA WATER & POWER COMPANY,
PETITIONER

v.

FEDERAL POWER COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Federal Power Commission together with its findings and conclusions, is reprinted in the record at pages 201–212. The opinion of the United States Court of Appeals for the District of Columbia (R. 2307–2322) is reported in 123 F. (2d) 155.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia (R. 2322) was entered on October 20, 1941. The petition for a

writ of certiorari was filed January 12, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the Susquehanna River, at Holtwood, Pennsylvania, is a navigable water of the United States.

2. Whether Section 23 (b) of the Federal Power Act of 1935, making it unlawful "to construct, operate, or maintain any dam * * * in any of the navigable waters of the United States * * * except under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to this chapter" applies to dams constructed and operated before the passage of the Act.

3. Whether Congress has impliedly consented to the construction, operation, and maintenance of petitioner's dam and power plant on the Susquehanna River.

4. Whether the maintenance of an unlicensed project may be enjoined only under Section 9 of the Rivers and Harbors Act of 1899, or may also be prohibited by direct order of the Federal Power Commission.

5. Whether the form of the order of the Federal Power Commission was appropriate in the circumstances of this case.

STATUTES INVOLVED

The applicable portions of the statutes involved are set forth in the Appendix, *infra*, pp. 13–14.

STATEMENT

Petitioner owns, maintains, and operates a dam, reservoir, power house, and other incidental works located on the Susquehanna River at Holtwood, Pennsylvania. This project was constructed between 1905 and 1909 without the express consent of Congress, and petitioner possesses no permit, right-of-way, or authority for its maintenance (R. 7, 208). On September 2, 1938, the Federal Power Commission issued an order (R. 27–28) directing petitioner to show cause why appropriate proceedings should not be instituted against it for operating and maintaining its power project across the Susquehanna at Holtwood without a license granted pursuant to the Federal Power Act or a permit or valid existing right-of-way granted prior to June 10, 1920. On October 10, 1938, petitioner filed an answer (R. 28) admitting the operation and maintenance of the project at Holtwood, but denying that the Susquehanna River was a navigable water of the United States and that the Commission had jurisdiction to institute any proceedings. Thereupon, on November 1, 1938, the Commission issued an order (R. 29–30) directing an investigation to determine all facts relating to the navigability of the river and

the authority under which the project was operated and maintained and to determine "whether an order of the Commission, appropriate, expedient and in the public interest should be issued to conserve and utilize the navigation and water power resources of said region." After a hearing, the Commission concluded that the Susquehanna River was navigable water of the United States from above petitioner's project in Pennsylvania to the mouth of the river in Maryland, that petitioner was maintaining and operating the power project without a license granted pursuant to the Federal Power Act or in accordance with valid authority granted prior to June 10, 1920, that continued maintenance and operation without a license was unlawful under Section 23 (b) of the Act, and "that an appropriate order in this case is an order requiring the respondent to apply for a standard form license under the Act" (R. 201–212).

The Commission found as facts, which are not disputed, that there was an annual average flow of water at Holtwood of approximately 35,000 cubic feet per second, that, in the vicinity, the river in its natural condition was between 600 and 3,000 feet in width and from 3 to 30 feet in depth, and that obstructions were not so serious as to render navigation impossible (R. 208). It also found that at various times since 1797 navigation on the

river had been facilitated by construction of canals along the river (R. 208–209), that prior to the completion of the canals, arks and rafts were navigated from Wilkes-Barre, Pennsylvania, to Havre de Grace, Maryland, carrying annual cargoes sometime reaching the value of $5,000,000 (R. 209), that with the advent of railroads navigation on the river declined, but that navigation in substantial amounts continued until the beginning of the present century when the canal was washed out by a flood and abandoned. It was found further that boats, barges, and dredges operate from practically the head of the Holtwood Pool down to the dam (R. 210), that very little excavation was necessary in the interstate stretch below the dam to permit passage of boats drawing 6 to 9 feet (R. 210–211), and that if locks were constructed in the Holtwood Dam and in the Conowingo Dam in Maryland, navigation could be conducted from the Holtwood Dam down to and beyond the State of Maryland (R. 211).

On petition for review (R. 1–23), the Court of Appeals affirmed the Commission's order (R. 2307–2322).

ARGUMENT

The court below, relying on the decision of this Court in *United States* v. *Appalachian Electric Power Co.*, 311 U. S. 377, held that the Susquehanna was a navigable water of the United States

(R. 2309–2317), that Section 23 (b) of the Federal Water Power Act of 1935, making it unlawful "to construct, operate, or maintain any dam * * *" in a navigable water of the United States without a license applied to dams constructed before the passage of the Act (R. 2320), that petitioner's dam was an unlawful structure placed in the river without the consent of Congress, and that the Commission's order, directing petitioner to apply for a license, was valid under Section 4 (g) of the Act (R. 2320–2321). This decision was clearly correct.

1. In *United States* v. *Appalachian Electric Power Co.*, 311 U. S. 377, this Court held that a river is navigable, not only if navigable in its natural condition, but also if capable of being made so by improvements at a reasonable cost, and that, under this test, the stretch of the New River there under consideration was navigable. A comparison of the physical characteristics of the Susquehanna and the New and the history of transportation on the two rivers, as set forth in the opinion of the court below (R. 2309–2317), leave no doubt that, under the rule of the *Appalachian* case, the Susquehanna is navigable. As the court below declared, "the differences existing (in favor of navigability) are all in favor of the Susquehanna" (R. 2316–2317). Moreover, even apart from the ruling in the *Appalachian* case,

the same result would have been compelled by earlier decisions of this Court.[1]

The fact that the Secretary of War in 1904 found the river non-navigable in reference to a railroad bridge at Havre de Grace (Pet. 11–12) is of little weight, since, as the court below properly observed (R. 2319), the decision was made in the view that navigable waters of the United States were confined to those susceptible of being used in their ordinary condition as highways of commerce. Moreover, as petitioner points out in its petition (Pet. 14), that decision was reversed by another Secretary of War in 1914.

Congress may lawfully require a license, including provisions in the interest of flood control and power, as a condition of the construction or maintenance of a project on a navigable river. In the *Appalachian* case, *supra,* this Court held that the power of Congress over navigable waters of the United States was not limited to control of navigation, but extended as well to "flood protection, watershed development" and "recovery of the cost of improvements through utilization of power" (311 U. S. at 426), and that the United States "may make the erection or maintenance of a structure in a navigable water dependent upon a license" (311 U. S. at 424) even though the river "is not

[1] See the concurring opinion of Mr. Justice Edgerton in the court below (R. 2321).

needed for navigation at this time" (311 U. S. at 426). See *Oklahoma* v. *Atkinson Co.*, 313 U. S. 508.

2. The maintenance of petitioner's project without a license is prohibited by the Federal Power Act of 1935. Section 23 (b) of the Act makes it unlawful "to construct, operate, or maintain" any dam in a navigable water of the United States "except under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to this chapter." Petitioner contends, however, that its dam was a lawful project, operated before the passage of the Act, with the implied consent of Congress, and that Section 23 (b) was not intended to apply to such dams. But the provision in express terms applies to the "maintenance" as well as the construction of a dam, and the explicit reference to permission granted prior to June 10, 1920, the date of the original enactment of the Federal Water Power Act, leaves no doubt that dams constructed prior to that date without licenses were intended to be included within the statutory prohibition.

Since the maintenance and operation authorized by the license are *in futuro,* petitioner's suggestion (Pet. 32) that the Commission is seeking to give the Act retroactive effect is plainly baseless.[2]

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[2] See *Lewis* v. *Fidelity & Deposit Co.*, 292 U. S. 559, 571; *Reynolds* v. *United States*, 292 U. S. 443, 449; *Cox* v. *Hart*, 260 U. S. 427, 435; *Mugler* v. *Kansas*, 123 U. S. 623; *In re Rahrer*, 140 U. S. 545, 564; *United States* v. *Freight Ass'n*,

Congress has never consented to the construction or maintenance of petitioner's project by license or otherwise. Petitioner concedes that Congress has never expressly consented to the construction of this dam and that a federal permit, right-of-way, or authority for operation and maintenance of the dam has never been secured (R. 7). The decision of the Secretary of War as to the navigability of the Susquehanna in reference to a railroad bridge, on which petitioner relies, is clearly not consent to the construction and maintenance of this dam (R. 2318). In any event long silence and acquiescence in the operation of a dam is no bar to a subsequent order of removal. *Union Bridge Co.* v. *United States,* 204 U. S. 364, 400.

3. The order of the Commission directing petitioner to apply for a license was authorized by Section 4 (g) of the Federal Power Act of 1935. Section 4 (g) was enacted for the express purpose of enabling the Commission to issue appropriate orders without the necessity of instituting court proceedings for the removal of the dam under Sections 9 and 12 of the Rivers and Harbors Act of 1899, 30 Stat. 1151–1152. (See H. Rep. No. 1318, 74th Cong., 1st Sess., p. 23; S. Rep. No. 621,

166 U. S. 290; *New York Cent. R. R.* v. *United States* (No. 2), 212 U. S. 500; *Chicago & Alton R. R.* v. *Tranbarger*, 238 U. S. 67; *Jacob Ruppert* v. *Caffey*, 251 U. S. 264, 301; *Samuels* v. *McCurdy*, 267 U. S. 188, 193; *Mulford* v. *Smith*, 307 U. S. 38, 51.

74th Cong. 1st Sess., p. 43.) The express authority contained in Section 4 (g) "to issue such order as it (the Commission) may find appropriate, expedient, and in the public interest to conserve and utilize the navigation and water-power resources of the region," when read in the light of the conditions prescribed for licenses (Federal Power Act, Sec. 10, 49 Stat. 842, 16 U. S. C. § 803), leaves no doubt that the Commission is authorized to impose such conditions as are constitutionally permissible under the rule of the *Appalachian* case. Petitioner's argument (p. 31) that Section 4 (g) authorizes the Commission only to order investigation, and to instigate judicial proceedings is plainly inconsistent with the language of the section, which authorizes it both "to order an investigation" and "to issue such order as it may find appropriate," etc.

Petitioner contends (Pet. 28–30) that the order amounts to an attempt to secure compliance with otherwise unlawful regulations as the price of not ordering the removal of the project, and that, since the Commission has found that removal would not be in the public interest, the order is therefore an abuse of discretion. The argument manifestly proceeds on the mistaken assumption that all regulation not directly concerned with removing obstructions to the movement of vessels is unlawful. This view was expressly rejected in the *Appalachian* case, *supra*.

Petitioner's further contention (Pet. 27–28) that the order is void because it compels petitioner to apply for a license without any alternative is similarly without substance. As the rule to show cause issued by the Commission expressly recites (R. 27–28; see also R. 201–202), the sole issue in the proceeding was whether petitioner should be required to apply for a license as a condition of continued operation and maintenance. Nowhere in the record is there any indication that the Commission purported to compel operation and maintenance of petitioner's project against its will. In these circumstances, the order purports only to require a license if operation and maintenance of the dam continue. This is, in effect, exactly what this Court ordered in the *Appalachian* case, when it instructed the District Court (311 U. S., at 429) "to enter an order enjoining the construction, maintenance or operation of the Radford project otherwise than under a license, accepted by the respondent within a reasonable time, substantially in the form tendered respondent by the Federal Power Commission." The question whether petitioner could be prevented from removing its structure should it so desire in the future may be left for determination when and if it should arise. (Cf. *Southport Petroleum Co.* v. *National Labor Relations Board,* No. 67, October Term, 1941.)

CONCLUSION

The decision of the court below is clearly correct. There is no conflict of decisions. For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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FEBRUARY 1942.

APPENDIX

Section 4 (g) of the Federal Power Act of 1935, 49 Stat. 838, 841 (16 U. S. C., sec. 797 (g)) authorizes and empowers the Federal Power Commission—

> (g) Upon its own motion to order an investigation of any occupancy of, or evidenced intention to occupy, for the purpose of developing electric power, public lands, reservations, or streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States by any person, corporation, State, or municipality and to issue such order as it may find appropriate, expedient, and in the public interest to conserve and utilize the navigation and water-power resources of the region.

Section 23 (b) of the Federal Power Act of 1935, 49 Stat. 838, 846 (16 U. S. C., sec. 817) provides as follows:

> (b) It shall be unlawful for any person, State, or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the navigable waters of the United States, or upon any part of the public lands or reservations of the United States (including the Territories), or utilize the surplus water or water power from any Government dam,

except under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to this Act. Any person, association, corporation, State, or municipality intending to construct a dam or other project works across, along, over, or in any stream or part thereof, other than those defined in this chapter as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States shall before such construction file declaration of such intention with the Commission, whereupon the Commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interest of interstate or foreign commerce would be affected by such proposed construction, such person, association, corporation, State, or municipality shall not construct, maintain, or operate such dam or other project works until it shall have applied for and shall have received a license under the provisions of this Act. If the Commission shall not so find, and if no public lands or reservations are affected, permission is hereby granted to construct such dam or other project works in such stream upon compliance with State laws.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 862.

PENNSYLVANIA WATER & POWER COMPANY,
A CORPORATION,
Petitioner,

vs.

FEDERAL POWER COMMISSION,
Respondent.

REPLY BRIEF FOR PENNSYLVANIA WATER & POWER COMPANY, PETITIONER.

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Respondent.

REPLY BRIEF FOR PENNSYLVANIA WATER & POWER COMPANY, PETITIONER.

This reply will be limited to (1) a new departure in respondent's brief and (2) mention of certain issues (presented by the petition) ignored by respondent. Reply will be made under the same captions as in petitioner's original brief, with page references to corresponding portions of the petition and the respective briefs. The petition and petitioner's brief will be referred to thus: [P. 1-40]; respondent's brief thus: [R. B. 1-12].

I.

A.

THE COMMISSION IS NOT—AND COULD NOT CONSTITUTIONALLY BE—AUTHORIZED, BY ANY STATUTE, TO *ORDER* ANYBODY TO ACCEPT—OR APPLY FOR—A LICENSE. [P. 27-28, 2-4, 17, 20; R. B. 11]

The Commission at last recognizes that its peremptory order that petitioner "shall within 30 days * * * file * * * an application * * * for a license * * * to operate and maintain the Holtwood project" [R. 215] is beyond its authority. The Commission now says this order means that petitioner shall *cease* operating and maintaining the dam *unless* petitioner applies for a license—but intimates that petitioner might be *prevented* by the Commission from *obeying* this order by removing the dam [R. B. 11].

This self-contradictory afterthought is contrary to the terms of the order and to the Commission's findings. The Commission found that "there is nothing in the record * * * which would support a conclusion" that an order requiring the project to be removed "would be expedient and in the public interest". The Commission *therefore* concluded "that an appropriate order * * * is an order requiring" petitioner "to apply for a * * * license" [P. 4; R. 207]. In the application for rehearing [R. 217] and in the petition for review [R. 20] petitioner denied the Commission's authority to order petitioner to apply for a license. The Commission now, for the first time, asks (in effect) that the order be rewritten contrary to the Commission's findings and the evidence.

I.

B.

THE COMMISSION IS NOT—AND COULD NOT CONSTITUTIONALLY BE—AUTHORIZED BY THE ACT OF 1935, BY SECTION 4(g), TO *ORDER* MAINTENANCE AND OPERATION OF A DAM STOPPED, FOR THE SOLE PURPOSE OF EXACTING RANSOM FOR *NOT* STOPPING IT. [P. 28-30, 17, 20-21; R. B. 10]

The Commission sets up and knocks down a man of straw, citing the *Appalachian* case [R. B. 10]. It simply ignores (1) the difference between (*a*) exercising the power (however broad) to "abate obstructions in the interests of commerce" and (*b*) exacting ransom for *not* exercising the power and (2) the decisions of this Court, *not* impaired on this point by the *Appalachian* case [P. 28-29].

II.

A.

THE ACT OF 1935, BY AMENDING SECTION 23 OF THE FEDERAL POWER ACT, DOES *NOT* MAKE UNLAWFUL THE CONTINUED OPERATION AND MAINTENANCE OF A LAWFULLY CONSTRUCTED DAM OPERATED EVER SINCE 1910. [P. 32-33, 18, 21; R. B. 8-9]

The lower Court construes section 23(b) as "retroactive", applicable to continued maintenance of lawfully constructed dams [R. 2320-2321; 123 F. 2d 163]. The Commission asserts that this is "plainly" *not* a retroactive construction, citing cases wholly unrelated on the facts [R. B. 8-9], ignoring on this point the *Appalachian* case [P. 20].

The Commission dogmatically insists that the word "maintain" has this effect [R. B. 8]. It ignores the natural *prospective* construction of "construct, operate or maintain" [P. 32], the saving clause [Section 23(a)],

which is broader than the prohibition [section 23(b)] [P. 33], the rule against retroactive construction, the reasons for the rule, and all other evidence of Congressional intent.

II.

A. [*supra*, 3]

B.

THE SUSQUEHANNA IS *NOT* A NAVIGABLE WATER OF THE UNITED STATES *WITHIN THE MEANING OF THE RIVERS AND HARBORS ACT OF 1899.* [P. 33-36, 18].

C.

PETITIONER'S DAM IS *NOT* UNLAWFULLY OPERATED AND MAINTAINED. [P. 36-37, 18; R. B. 9. On this point (R. B. 9) the Commission confuses (*a*) the *fact* of Congressional consent (express or implied) to an obstruction and (*b*) *revocation* of such consent in the exercise of the power to "abate obstructions"—*not* to exact ransom for *not* abating them.]

D.

CONGRESS DID *NOT*, BY THE ACT OF 1935, AUTHORIZE THE COMMISSION TO *RETROACTIVELY OVERRULE* SECRETARY TAFT'S AND MR. FRANKFURTER'S ADMINISTRATIVE CONSTRUCTION OF THE ACT OF 1899, *AS APPLIED TO THE SUSQUEHANNA RIVER*, SO AS TO OUTLAW A DAM BUILT ON THE FAITH OF THAT CONSTRUCTION AND MAINTAINED WITHOUT GOVERNMENTAL OBJECTION FOR 25 YEARS. [P. 38-40, 19, 22-23]

On all these questions as to the construction and application of the Acts of 1899, 1920 and 1935, the Commission completely ignores the unusually full and clear history of practical administrative construction—by the executive, legislative and judicial branches of the Government. In the *Appalachian* case this Court holds that the application of such statutes to particular waters in-

volves "questions of law inseparable from the particular facts to which they are applied" and that each application of the legal test "is apt to uncover variations and refinements which require further elaboration" [311 U. S. 404, 406]. This circumstance makes practical disposition of such mixed questions of law and fact peculiarly appropriate. Nevertheless the administrative construction and application by the Commission's predecessors, SECRETARY TAFT and MR. FRANKFURTER [P. 10-14, 38], the reports to Congress specifically discussing petitioner's dam [P. 15-16, 38-39], the Commission's explanation to Congress of the amendments, "all minor", requested and obtained in 1935 [P. 27, 39], and its counsel's statement to Congress as to the legal status of petitioner's dam at that time [P. 16-17]—have all been ignored by the Commission.

Usually commissions and other Governmental agencies emphasize—and overemphasize—alleged practical administrative construction and application of statutes. At this moment the Commission is preparing to ask this Court to review the decision of the Circuit Court of Appeals for the Third Circuit, as to the construction and application of Section 20 of the Federal Power Act, in *Safe Harbor Water Power Corporation v. Federal Power Commission,* 3 Cir., 124 F. 2d.....*,* decided December 2, 1941, [P. 22-23. *Cf. Safe Harbor Water Power Corporation v. United States,* 313 U. S. 546]. In that case the Commission unsuccessfully urged extreme contentions as to alleged administrative construction of the Act of 1920 and effect of the Act of 1935 on the construction of *unchanged* provisions of the Act of 1920. The Commission has announced to the Circuit Court of Appeals its intention to apply for the writ of certiorari, and has obtained two

successive stays of the mandate. The second stay will expire on February 23, 1942; the statutory period for application for certiorari will expire on March 2, 1942.

In order that the Commission's (and its opponents') various contentions as to the practical construction and application of the Federal Power Act and the interrelation between the Acts of 1920 and 1935 may all be before this Court at the same time, petitioner respectfully suggests that action on this petition for certiorari be deferred until consideration of the Commission's application about to be made in the *Safe Harbor* case.

Respectfully submitted,

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